Lords Hamblen and Leggatt appeared to be willing to give an extraordinarily broad effect to this principle, extending beyond proper questions of validity to other matters. In particular, they suggested that, if a potentially applicable law would give narrow scope to the arbitration agreement, that might be a reason for applying another law instead. This muscular pro-arbitration stance may be born of a pragmatic desire to make English courts as attractive as possible for international commercial actors. But, as Lords Burrows and Sales noted (at [199], [277]) its basis in principle is dubious. And, if construction is a relevant factor for the validating tendency, might other parts of a *prima facie* applicable law be relevant too? For example, what about if the arbitration agreement is varied orally to include a new party but the applicable law gives effect to a no oral modification (NOM) clause in the main contract? Giving effect to the NOM clause impairs the arbitration agreement by preventing it from extending to the new party. That very issue arose recently in *Kabab-Ji SAL v Kout Food Group* [2020] EWCA Civ 6, [2020] 1 CLC 90. The Supreme Court has given permission to appeal in *Kabab-Ji*, so it may not be too long before we are given a better sense of what this muscular validating tendency means for arbitration in English law.

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EXPERTS AS FIDUCIARIES – AN ACADEMIC DISTRACTION

THE most contested issue in *Secretariat Consulting Pte Ltd. v A Company* [2021] EWCA Civ 6 was, in the end, irrelevant to the outcome. The "novel and potentially significant" issue was whether an expert – here a litigation support expert – owed a fiduciary duty to its client. There was no direct English authority. The trial judge decided the expert was a fiduciary; the Court of Appeal held the fiduciary point to be "an academic distraction … immaterial to the real issues" (at [64]).

The client (C) was the developer of a multi-billion-dollar petrochemical plant. It was embroiled in costly disputes with one of its subcontractors and with the project manager for the entire development. Both disputes involved the same or similar factual issues. C engaged the defendant as an expert to provide it with support, advice and expert witness reports for Arbitration 1. Later it emerged that the same expert was providing its services to the project manager in Arbitration 2. C successfully sought an injunction to prevent the expert acting for the project manager in Arbitration 2.

The trial judge ordered the injunction on the basis that the expert owed fiduciary duties to its client, and so could not engage in conflicts, including

acting for and against its client in related disputes. The Court of Appeal upheld the injunction, but based its findings on the express terms of the contract, holding that the contract bound every entity within the expert's corporate group. Those terms indicated that the expert had no existing conflicts with other clients preventing it from giving independent advice to C, and that this would remain the position for the duration of the engagement. It followed that the entity contracting with the project manager was in breach of that undertaking and could be enjoined from acting for the project manager.

The fiduciary arguments are of considerable interest, even though the Court of Appeal did not fully explore why they should be dismissed. A finding that someone is a fiduciary on the facts (an "ad hoc fiduciary") is usually based on suitably strong analogies between the relationship in hand and that of some recognised status-based fiduciary. Here, for example, the situation may seem superficially analogous to that of a solicitor who, absent express consent, must refrain from engagements involving either conflicts of duty and interest or conflicts of duty and duty (such as may arise in acting for both sides in a transaction). These two types of conflicts are often presented together as "fiduciary" prohibitions (see [40], citing Leggatt L.J. in *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [159]). However, this common bundling hides the very dramatic differences between the two, and may have been the cause of much of the fiduciary distraction in this case.

The trial judge noted that the expert was not simply engaged to provide expert witness reports, but also to provide extensive advice and support for C throughout the arbitration proceedings. She held that these factual circumstances indicated a relationship of trust and confidence which in turn gave rise to a fiduciary duty of loyalty, and which thus required the fiduciary to avoid conflicts of duty and interest as well as conflicts of the double employment type in issue here. These steps were taken at pace, and highlight the ease with which it is possible to slip from trust and confidence to fiduciary obligation, and then from one type of disloyalty to another, especially when using the umbrella label of a duty to "avoid conflicts". There are several observations that might be made on this. First, a relationship of trust and confidence may be descriptive of fiduciary relationships, but it is not definitional. Many ordinary contracts involve one party reposing trust and confidence in the other – consider my contracts with my plumber or my doctor. These relationships are not fiduciary. In short, trust and confidence does not of itself give rise to fiduciary duties of loyalty (see [41] and *Al Nehayan*, at [163], [165]).

Further, even if there *is* a fiduciary relationship, and we repeat the mantra that its defining characteristic is a duty of loyalty, that assertion is of no practical use until we give the duty of loyalty some specific content: it requires the fiduciary to act in her principal's interests *and not in the*

fiduciary's own interests. It is this duty of self-denial that indicates that the "conflict" in the sight lines is a conflict of duty and interest. It is this proscribed conflicted conduct which, if committed, leads logically to the distinctively fiduciary remedy of disgorgement of disloyal gains (see [40] citing *Al Nehayan*, at [159], and Millett L.J. in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18).

By contrast, and it is a dramatic contrast, the duty of loyalty that is in issue when we speak of *conflicts of duty and duty* is quite different. It is loyalty to the *endeavour* being pursued, a loyalty that is in play whenever anyone has a power or discretion or choice to exercise. The specific demands of *this* duty of loyalty are that the power-holder must exercise his powers in good faith and for proper purposes. Although worded prescriptively, the cases indicate, again, a proscriptive approach: judicial intervention follows decisions that are taken in bad faith or taken for improper purposes (i.e. for ends alien to the endeavour). Very often one person may have powers or discretions to exercise across a variety of roles where none impedes any other. Solicitors regularly act for different clients on unrelated matters; board members serve on the boards of institutions with unrelated interests. But when a solicitor or a board member is asked about "potential conflicts" before they take on a new role, they are not being asked about potential breaches of their distinctively *fiduciary* duties of self-denial to the new client or company; they are being asked whether they can actually *do* the job they are being asked to do without *bias*, without acting for improper purposes, favouring extraneous interests rather than the endeavour to which they being asked to commit. Fiduciaries can be put in this difficult position, but so too can many non-fiduciaries – see the many cases on judicial review of the exercise of discretions by shareholders, bondholders and indeed those exercising purely contractual discretions.

Further, just as it can be difficult to show that someone is an ad hoc fiduciary, so it can be difficult to show that an adviser or expert *cannot* perform properly when advising clients with conflicting interests. That is especially so when the client engaging those services must know that the adviser acts for all manner of parties, some of whom may have conflicting interests: see *Kelly v Cooper* [1993] A.C. 205 (H.L.) on real estate agents, and the discussion of barristers' chambers in this case. This explains why parties typically insist on contractual terms barring all conflicts, as was done here. That obviates the need for proof that the expert advisory role cannot be undertaken effectively unless conflicts are avoided, or, failing that, needing to rely on the much narrower claim that breaches of confidence are inevitable.

Experts nicely illustrate the dilemma. A handwriting expert, or an expert on foreign law, might not face irreconcilable conflicts if asked by both sides to act as an expert witness in the same matter (see [111]). By contrast, a solicitor advising on strategy and approach in a contentious issue could

not possibly act for both sides in the same transaction and do the job properly. This is not because the solicitor is a fiduciary and must not be swayed by *self*-interest; it is because the job in hand requires *unbiased* advice to the client, and that cannot be given when the demands from different clients tug in opposite directions. The same issue arises if a public relations firm is asked to advise on the promotional campaigns for a protagonist and her opponent, or a judge hears a matter argued by an advocate with whom she has a family relationship. This makes the point that "double employment" may often provide the context, but it is not essential. What is relevant is any factual context which indicates the decision maker will inevitably be tempted to make choices for improper purposes, or purposes not aligned with the endeavour to which he has committed.

Taking that further, here the expert argued that it could *not* be a fiduciary – and so could not be barred from working for the client's project manager – because its overriding duty was owed to the court. Both the trial judge and the Court of Appeal gave this short shrift. And of course if the fiduciary duty of self-denial is in issue, then that is right: the two duties are not in conflict. But the duty to exercise powers or discretions in a particular way cannot perhaps be dismissed so readily. This is surely why there are so many explicit rules making it clear that the expert's overriding duty in providing its expert testimony is to the court or the tribunal. Here it was a term of the expert's contract. This overriding duty will have an impact on the extent of the necessary enquiry and the degree of disclosure required in the report. But note that this overriding duty extends only to the expert testimony. In other areas, and in particular in advising on litigation strategy, the expert is in the same position as the solicitor advising her client. This means the distinction between the "testifying" expert and the "roving" expert (or one with a broad remit as a confidential adviser) is material (at [82]–[86]).

All these various enquiries are clearly unrelated to a fiduciary duty of self-denial; they all relate to advisory discretions. The focus in this case thus needed to be on the distinctive rules applying to those with discretions to exercise, and whether *that* role would necessarily be impeded by conflicting external demands. The Court of Appeal did not draw out this crucial distinction, although arguably it explains why it was quite right to dismiss the "fiduciary" route as a distraction, and indeed an irrelevant distraction. However, I would not myself have described it as an "academic" distraction.

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